NO. 42233-6-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

JERRY ALLEN ANDERSON,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR COWLITZ COUNTY

The Honorable Michael Evans, Judge

APPELLANT'S BRIEF

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3. The trial court erred in admitting a statement written by Eric Smith as substantive evidence under ER 801(d)(1)(i).

4. The trial court erred in entering jury verdicts against Mr. Anderson when the evidence against Mr. Anderson was obtained in violation of his right to state and federal due process.

5. The trial court erred in failing to exclude Mr. Anderson's washed out 1997 juvenile convictions for second degree theft from his offender score.

6. The trial court erred in adopting section 2.2 of the Judgment and Sentence for Cause Number 09-1-00599-8.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Under ER 801(d)(1)(i), a witness's prior written statement can be admitted as substantive evidence at trial only if it meets certain limited criteria to include that it was "given under oath...[at an] other proceeding[.]" Over Mr. Anderson's objection, the court admitted three written statements by three witnesses who provided their statements to

police officers as a routine part of an investigation and not as part of any "other proceeding." Was it error for the trial court to substantively admit the statements?

2. For purposes of scoring criminal history, class C felonies are not included in an offender score ('was out") once an offender is crime free for five years. The Judgment and Sentence for cause number 09-1-00599-8 reads that Mr. Anderson was crime free for five years after being convicted and sentenced for second degree theft as a juvenile in 1997. Was it error for the trial court to include the theft conviction in the offense score calculation?

STATEMENT OF THE CASE

1. Procedural Facts.

Mr. Anderson was tried on joined cause numbers 09-1-00599-8 and 09-1-01258-7. RP Volume 2A at 214-18; CP 09-1-00599-8 4-6; CP 09-1-01258-7 51-53.

Cause number 09-1-00599-8 charged Mr. Anderson by Amended Information with three crimes: Count I, second degree assault by strangulation, May 26, 2009, incident date; Count II, violation a domestic violence no contact order, incident date May 26, 2009; and Count III, second degree assault by strangulation, incident date March 25, 2009. The named victim in each charge was Lisa Shippy. CP 4-6 (09-1-00599-8).

Lisa Shippy also goes by the name of Lisa Garner. RP Volume 3A at 553. She is referred to in Appellant's Brief as Lisa Garner.

Cause number 09-1-01258-7 charged Mr. Anderson by Second Amended Information with three crimes: Count I, second degree assault by strangulation, November 7, 2009, incident date; Count II, second degree theft, incident date May 26, 2009; and Count III, obstructing a law enforcement officer, incident date May 6, 2010. The named victim in both the assault and the theft charge was again Lisa Garner (Shippy). CP 09-1-01258-7 51-53.

Prior to trial, the court heard a motion to exclude written statements Lisa Garner provided to the police on March 26, 2009, May 26, 2009, and November 7, 2009. RP Volume 1 at 38-198. The trial court denied the motion and the written statements were admitted at trial as substantive evidence over Mr. Anderson's objection. RP Volume 1 at 180-98; RP Volume 3A at 571-72, 590, 594, 619; Exhibits 13, 14, 17, 19.

The jury found Mr. Anderson guilty under cause number 09-1-00599-8 of violating a domestic contact order and a lesser offense of fourth degree assault. CP 77-81. Under cause number 09-1-01258-7, the jury found Mr. Anderson guilty of obstructing. CP 99-102.

The court imposed a standard range sentence of 60 months after calculating Mr. Anderson's offender score at eight points. CP 16, 20; RP

Volume 6 at 1311, 1322. The offender score calculation included ½ point for a 1997 Thurston County juvenile second degree theft even though the criminal history reflected that Mr. Anderson had been crime free for five years before committing his next offense in 2003. CP 16.

2. Trial testimony.

Lisa Garner and her fiancée Jerry Anderson have a volatile on-again, off-again relationship. The couples have been together for four years. RP Volume 3A at 556. Sometimes they argued back and forth. Sometimes those arguments turned physical.

On March 25, 2009, Mr. Anderson was sick in bed. RP Volume 3A at 560-62. He blamed Garner's son, Shadow, for bringing home germs. This angered Garner. Id. She and Mr. Anderson struggled over a phone. Id. Mr. Anderson held Garner down in an effort to grab the phone from her. Id, at 564. Garner left the house and went next door. Id, at 563. She called the police. Id. Longview Police Officer Jeff Leak arrived to investigate. RP Volume 3B at 751. Garner provided a written statement to Officer Leak. Id, at 764; Exhibit 17. She complained that Mr. Anderson grabbed her throat during the struggle. Id, at 758. Officer Leak did not see any injuries consistent with that allegation. Id, at 773. Officer Leak issued a citation to Mr. Anderson. Id, at 765. In court the next day, the

court issued an order prohibiting Mr. Anderson from contacting Garner. RP Volume 4B at 1017, 1019-20.

On May 25, Garner hosted a party at a house she shared with Mr. Anderson. RP Volume 3A at 576. The no contact order issued in March was still in effect. RP Volume 4B at 1021. Several family members were at the part to include Garner's sister, Crystal Alvarado,[1] and Ms. Alvarado's then-boyfriend, Eric Smith. RP Volume 4A at 854-55, 881-82. An augment started between Garner and Mr. Anderson about something a neighbor might have said. RP Volume 3A at 577-78. Mr. Anderson decided he wanted to leave the house. Id, at 577, 579. Garner did not want him to leave. Id, at 577. Garner kept getting in Mr. Anderson's way. Id, at 579-82. Mr. Anderson pushed past Garner and left the house. Id, at 580.

The next day, Garner called her daughter, Tiffany Denton, and asked for a ride to the hospital. RP Volume 3A at 584; RP Volume 3B at 745. Garner has a long history of chronic back pain and was feeling it that morning. RP Volume 3A at 577; RP Volume 3B at 745. Garner talked to her daughter about the argument she had with Mr. Anderson the night before. RP Volume 3B at 746.

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[1] Ms. Alvarado and Mr. Smith later married. Ms. Alvarado changed her last name to Smith. In Appellant's Brief, she is referred to as Crystal Alvarado.

Longview Police Officer Charlie Meadows spoke to Garner. RP Volume 2B at 514-515. Garner provided two written statements. Id, at 516, 524; Exhibits 13 and 14. One statement was written earlier in the day and the other statement some hours later. Id. Garner told another Longview police officer, Officer Ty Mauck, that during the dispute at the party, Mr. Anderson put his hands on her throat causing interference with her breathing. RP Volume 4A at 923-28. She also said that Mr. Anderson threw her onto the floor. Id, at 926. Dr. Martin Gillen examined Garner at the hospital. RP Volume 4A at 805-06. He noted marks on her neck consistent with strangulation. Id. at 814.

Alvarado and Smith came to the hospital to give Garner a ride home. RP Volume 4A at 885-86. Even though they had been at the party the night before, they had not seen the violence described by Garner. Id, at 855, 848, 882, 884. At the hospital, Garner was angry with Mr. Anderson. Id, at 904. Garner gave Alvarado a version of events about what happened and asked Alvarado to include that version in a written statement to Officer Meadows. Id, 892-94. Alvarado did so and Alvarado also convinced Smith to do so. Id, at 863-66, 887-91; Exhibits 15, 16. Neither Alvarado nor Smith knew that the version of events in their respective statements was a lie made up by Garner. Id, at 869, 898. Over

Mr. Anderson's objection, both of these written statements were admitted as substantive evidence at trial. Id, at 867, 892.

Garner moved to Kelso. RP Volume 3A at 600. The court terminated the no contact order between Mr. Anderson and Garner on July 1, 2009. RP Volume 4B at 1021. Mr. Anderson was staying with Garner. RP Volume 3A at 601.

Garner worked at a tavern. Id, at 601. On November 7, 2009, after finishing her shift, she got a ride home from a customer. Id, at 602. Once at home, Garner made Mr. Anderson a sandwich. Id, at 603. Mr. Anderson sat down in front of the computer. Id. The couple argued over whether the customer should come in the house rather than drive home. Id. at 603-04. A physical struggle broke out when Garner tried to unplug the computer. Id. Garner threw a plate at Mr. Anderson slicing open his elbow and causing it to bleed. Id. at 607. Garner called to the neighbors from her front porch asking them to call the police. Id, 609. Mr. Anderson pulled Garner back in the house. Id, at 610.

Someone called the police causing Officer Jeff Brown to be dispatched. RP Volume 4A at 935-40. When he arrived at Garner's address, she appeared terrified to Officer Brown. Id, at 940. After Garner calmed down, she provided Officer Brown with a written statement. Id, at

959; Exhibit 19. Garner told Officer Brown that Mr. Anderson put his hands on her throat and interfered with her ability to breathe. Id, at 947.

At trial, Ms. Garner testified that all of her written statements were untrue. RP Volume 3A at 574, 589-93, 615, 622, 643-77. She wrote them at the time because she was mad at Mr. Anderson and wanted to get back at him for wanting to leave her. Id, at 643-77. The court admitted all of the written statement as substantive evidence over Mr. Anderson's objection. Id, at 572, 590, 619.

After being convicted and sentenced only for the May no contact order violation in conjunction with a fourth degree assault, Mr. Anderson filed a Notice of Appeal. CP 29-44, 111-18.

ARGUMENT

I. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT ALLOWED IN HEARSAY EVIDENCE UNDER THE GUISE OF A PREVIOUSLY SWORN INCONSISTENT STATEMENT.

A. Standard of Review

The admission of evidence is reviewed for abuse of discretion. *State v. Pirtle*, 127 Wn.2d 628, 648, 904 P.2d 245 (1995), *cert. denied*, 518 U.S. 1026 (1996). "A trial court abuses its discretion when its decision is manifestly unreasonable or based upon untenable grounds." *State v. Perrett*, 86 Wn.App. 312, 319, 936 P.2d 426, *review denied*, 133 Wn.2d 1019 (1997). Mr. Anderson bears the burden of proving abuse of

discretion. *State v. Hentz*, 32 Wn.App. 186, 190, 647 P.2d 39 (1982), *rev'd on other grounds*, 99 Wn.2d 538 (1983).

B. Factual Basis

On May 26, 2009, Longview Police Officer Charlie Meadows responded to an assault complaint. He interviewed Lisa Garner. He asked Ms. Garner to fill out a written statement. He provided Garner with a standard pre-printed Longview Police form. At the bottom of the form, there is pre-printed language that the statement is made "under the penalty of perjury." RP Volume I at 65; Exhibits 13 and 14. Garner made a written statement on the form. After signing it, she returned it to Officer Meadows. Some six hours later, Officer Meadows returned and spoke with Garner again about the same incident. Ms. Garner filled out another standard Longview Police statement form. Se Exhibits 13 and 14.

As part of his investigation, Officer Meadows interviewed Crystal Alvarado and Eric Smith.. Officer Meadows gave both Alvarado and Smith the a standard Longview Police form to fill out. Both Smith and Alvarado filed out the form and signed it near the pre-printed section that said the statement was made "under the penalty of perjury." Exhibits 15 and 16.

At trial, Garner, Alvarado, and Smith testified contrary to the written statements they gave to Officer Meadows. The trial court admitted their written statements over Mr. Anderson's objection.

C. The trial court erred in admitting the written statements of Lisa Garner and Crystal Alvarado and Eric Smith as substantive evidence.

While due process does not guarantee every person a perfect trial, *Bruton v. United States*, 391 U.S. 123, 20 L.Ed.2d 476, 88 S.Ct. 1620 (1968), both our state and federal constitutions do guarantee all defendants a fair trial untainted from inadmissible, prejudicial evidence. *State v. Swenson,* 62 Wn2d 259, 382 P.2d 614 (1963). They also guarantee a fair trial untainted by unreliable evidence. *State v. Ford,* 137 Wn.d 472, 973 P.2d 472 (1999).

Here, the trial court admitted the written statements of Lisa Garner, Crystal Alvarado, and Eric Smith, substantively under the theory that the statements were "*Smith affidavits*." *State v. Smith*, 97 Wn.2d 856, 651 P.2d 207 (1982). This written statements, however, did not meet the strict requirements set out for such statements by *Smith*, and its progeny. As such, they statements should have been excluded.

A witness's prior inconsistent statement is admissible as substantive evidence only if it satisfies the elements of ER 801(d)(1)(i). *Smith*, 97 Wn.2d at 856. ER 801(d)(1)(i) provides,

> (d) Statements Which Are Not Hearsay. A statement is not hearsay if--
>
> (1) Prior Statement by Witness. The declarant testifies at the trial or hearing and is subject to cross examination concerning the statement, and the statement is (i) inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition[.]

Because of the *Smith* decision, these sorts of written statements are often referred to as a *Smith affidavit*. See *State v. Binch Thach*, 126 Wn. App. 297, 304, 106 P.3d 782 (2005). Key to a *Smith affidavit's* admissibility is proof of its reliability. *Smith*, 97 Wn.2d at 863. To determine whether an earlier statement is reliable and therefore admissible, the trial court considers the *Smith* factors. *Smith*, 97 Wn.2d at 861-63; *State v. Nelson*, 74 Wn. App. 380, 387, 874 P.2d 170, *review denied*, 125 Wn.2d 1002 (1994). Those factors are: (1) whether the witness voluntarily made the statement; (2) whether there were minimal guaranties of truthfulness; (3) whether the statement was taken as part of a standard procedure in one of the four legally permissive methods for determining the existence of probable cause; and (4) whether the witness was subject to cross examination when giving the subsequent inconsistent statement. *Smith*, 97 Wn.2d at 861-63.

As to *Smith* factors (1) and (4), Garner, Alvarado, and Smith, each testified they voluntary wrote their statements. By writing her statement,

Garner hoped to get Mr. Anderson in trouble. Garner gave Alvarado a version of events to put in her written statement. Alvarado asked her then-boyfriend, Smith, to write a statement based on what Garner told her. Neither Alvarado nor Smith knew that Garner lied about what happened and, consequently, that their respective statements were untrue.

Because Garner, Alvarado, and Smith each testified, they were subject to cross-examination when they testified contrary to their written statements.

As to the second *Smith* factor, the minimum guaranties of truthfulness are absent. The minimal guaranty of truthfulness element is satisfied if the statement was made under oath subject to the penalty of perjury and in a formalized proceeding. *Smith*, 97 Wn.2d at 862; ER 801(d)(1)(i). In *Smith*, *supra*, and *State v. Nelson*, 74 Wn. App. 380, both courts looked favorably on the use of a notary to administer an oath before a witness ascribed to the truthfulness of a statement.

Nothing about the process used in Mr. Anderson's case suggests that Garner, Alvarado, or Smith made their statements under oath. This lack of oath cannot simply be ignored. The court is obliged to construe ER 801(d)(1)(i) according to its plain meaning, and to give effect to all of its language. *State v. Sua*, 115 Wn. App. 29, 48, 60 P.3d 1234 (2003). In *Sua*, the court reversed a conviction in part because the trial court admitted

a *Smith affidavit* that was not made under oath subject to the penalty of perjury. *State v. Sua*, 115 Wn. App. at.48. The same should hold true here.

An unsworn written statement can satisfy the oath requirement if it is signed and contains language such as, "I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct[.]" RCW 9A.72.085[2]; *State v. Nieto*, 119 Wn. App. 157, 161, 79 P.3d 473, 476 (2003). But Garner, Alvarado, and Smith all testified that they did not look closely at the statements they signed. They had not idea that they were supposedly swearing to tell the truth, akin to what you would do in court when you swear to tell the truth. Also, Officer Meadows did nothing to assure that Garner, Alvarado, or Smith understood the import of their signature. He simply handed them the pre-printed form and asked that they write a statement.

Finally, the statements were only partially used to determine probable cause. There are four legally permissible methods for

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[2] Whenever, under any law of this state or under any rule, order, or requirement made under the law of this state, any matter in an official proceeding is required or permitted to be supported, evidenced, established, or proved by a person's sworn written statement, declaration, verification, certificate, oath, or affidavit, the matter may with like force and effect be supported, evidenced, established, or proved in the official proceeding by an unsworn written statement, declaration, verification, or certificate, which:
(1) Recites that it is certified or declared by the person to be true under penalty of perjury
(2) Is subscribed by the person;
(3) States the date and place of its execution; and
(4) States that it is so certified or declared under the laws of the state of Washington.

determining the existence of probable cause thus allowing charges to be filed against a defendant: (1) filing of an information by a prosecutor in superior court; (2) grand jury indictment; (3) inquest proceedings; and (4) filing of a criminal complaint before a magistrate. *Smith*, 97 Wn.2d 862. Here, at most, only Garner's, and to a lesser degree, Alvarado's, statements factored in to the establishment of probable cause. Supplemental Designation of Clerk's Papers (probable cause statements, sub nom. no. 3, 09-1-01258-7 and no. 2, 09-1-00599-8).

Accordingly, two of the four *Smith* factors, are not met.

D. The trial court abused its discretion in admitting written statements from Garner, Alvarado, and Smith.

If the trial court based its evidentiary ruling on an incomplete legal analysis or a misapprehension of legal issues, the ruling may be an abuse of discretion. *City of Kennewick v. Day*, 142 Wn.2d 1, 5, 11 P.3d 304 (2000).

Here the trial court abused its discretion in admitting the written statements from Garner, Alvarado, and Smith. While the court said that all of the elements for admissibility were met, it is clear from the above analysis that they were not. Two of the four *Smith* factors, arguably the most important two, are absent. The proponent of the statement's admissibility bears the burden of proving each of these elements. *State v.*

Nieto, 119 Wn. App. 157, 79 P.3d 473 (2003). Here, the state as the proponent of the written statements' admissibly, failed to establish their reliability prior to its admission. Accordingly, the trial court abused its discretion when it allowed the statement to be used as evidence against Mr. Anderson.

E. Neither the violation of the no-contact order or the fourth degree assault conviction can be sustained absent the written statements.

For Mr. Anderson to be convicted of violating the no contact order the state had to prove that Mr. Anderson knew of the existence of a valid no contact order and knowingly violated the order ad that his conduct was an assault or reckless conduct that created a substantial risk of death or serious physical injury to Garner. CP 82 (Instruction 31).

For Mr. Anderson to be convicted of fourth degree assault, the state had to prove that on March 25, 2009, he assaulted Lisa Garner. CP 75 (Instruction 19).

Absent the written statements by Garner, Alvarado and Smith, the only testifying witness to what happened between Garner and Mr. Anderson is Garner. Garner testified that Mr. Anderson was just trying to get past her when she was blocking his path out of the house. Nothing about the conduct formed the basis for either a simple assault or reckless conduct putting Garner at risk of substantial risk of death or serious injury.

II. MR. ANDERSON'S 1997 JUVENILE CONVICTION FOR SECOND DEGREE THEFT WASHES OUT OF HIS CRIMINAL HISTORY.

A. Standard of Review

A sentencing court's offender score determination is reviewed de novo. *State v. Rivers*, 130 Wn. App. 689, 699, 128 P.3d 608 (2005), *review denied*, 163 Wn.2d 1043, *cert. denied*, __ U.S. __, 129 S.Ct. 648, 172 L.Ed.2d 627 (2008).

B. Factual Basis

Mr. Anderson's criminal history is listed at section 2.2 of the Judgment and Sentence for cause number 09-1-00599-8. CP 32. It lists the last of Mr. Anderson's five juvenile convictions as a Thurston County second degree theft. The sentence date is September 8, 1997. CP 32. Chronologically, Mr. Anderson's next incident date for a committed crime is June 4, 2003. That conviction is for a possession of a controlled substance in Cowlitz County. CP 32.

C. Mr. Anderson's second degree theft washed out and should not be included in his offender score calculation.

Pursuant to RCW 9.94A.525(2)(c),

> Except as provided in (e) of this subsection, class C prior felony convictions other than sex offenses shall not be included in the offender score if, since the last date of release from confinement (including full-time residential treatment) pursuant to a felony conviction, if any, or entry of judgment and sentence, the offender

had spent five consecutive years in the community without committing any crime that subsequently results in a conviction.

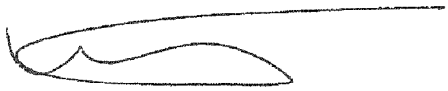
Second degree theft is a class C felony. RCW 9A.56.040(2). None of the exceptions in RCW 9.94A.525(2)(c) apply to Mr. Anderson's case. An offender may challenge erroneous sentences lacking statutory authority for the first time on appeal. *In re Pers. Restraint of Goodwin*, 146 Wn.2d 861, 877, 50 P.3d 618 (2002). A sentencing court acts without statutory authority when it imposes a sentence based on a miscalculated offender score. *In re Pers. Restraint of Johnson*, 131 Wn.2d 558, 568, 933 P.2d 1019 (1997).

As the inclusion of the Thurston County juvenile second degree theft should not be included in Mr. Anderson's offender score, Mr. Anderson's case should be remanded to the trial to delete it from his offender score calculation and criminal history. Mr. Anderson's offender score otherwise remains accurately computed as eight points. RCW 9.94A.525.

CONCLUSION

Mr. Anderson's convictions for violation of a no contact order and fourth degree assault should be reversed. Alternatively, his case should be remanded to correct his criminal history.

Respectfully submitted on January 24, 2012.



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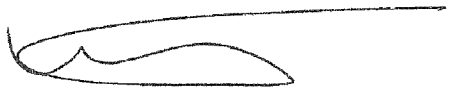
CERTIFICATE OF SERVICE

Lisa E. Tabbut declares as follows:

On today's date, I efiled via the Court's web filing portal the Brief of Appellant with: (1) Susan I. Baur, Cowlitz County Prosecutor's Office at SasserM@co.cowlitz.wa.us; and (2) the Court of Appeals, Division II; and (3) I mailed it to Jerry A. Anderson/DOC#859165, Stafford Creek Corrections Center, 191 Constantine Way, Aberdeen, WA 98520.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed January 24, 2012, in Longview, Washington.



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